## *RE* DATO' MOHAMED PILUS BIN YUSOH, EX PARTE SOUTHERN BANK BHD.

[O.C.J. (Peh Swee Chin J.) September 17, 1987]

[Ipoh – Bankruptcy No. 43-401-86]

*Bankruptcy – Adjournment – Application for – Discretion of court – Special rules in bankruptcy proceedings – Bankruptcy Act 1967, s. 6 – Bankruptcy Rules 1969, r. 127.*

*Civil Procedure – Adjournment – Application for – Discretion of court – Special rules in bankruptcy proceedings.*

In the present case, a debtor failed to comply with a bankruptcy notice based on certain judgment sums.

The bankruptcy petition was served on the debtor on July 11, 1986. It came up for hearing on October 13, 1986. Learned counsel for the debtor asked for an adjournment which was granted. The hearing of the petition was adjourned to December 8, 1986. The ground for the application for the adjournment was that the debtor had entered into some scheme of arrangement. On December 8, 1986, the petition came up in court for the second time and learned counsel for the debtor informed the court that an attempt was to be made to recover money due to the debtor. The court adjourned the matter to April 3, 1987. On April 3, 1987, the petition came up for hearing for the third time. Adjournment was asked by the debtor's counsel on similar grounds as before. The hearing of the petition was adjourned to June 30, 1987. On June 30, 1987, the petition came up for hearing for the fourth time. The debtor's counsel submitted a medical certificate in respect of the debtor's illness and sought an adjournment. The request was rejected and a receiving and adjudication order was then made against the debtor.

**Held:** (1) generally, in the matter of adjournment, it is a matter within the discretion of the trial judge, and an appellate court will not interfere with a refusal of adjournment unless it appears that the result of such refusal has been to defeat the rights of an applicant altogether or it is an injustice to such applicant. However, in bankruptcy proceedings, the matter of adjournment assumes a different line;

(2) adjournment of a bankruptcy petition, as distinct from an order of stay of bankruptcy proceedings, seems to be dealt with only by rule 127 of the Bankruptcy Rules 1969. By rule 127, the court's discretion is to be exercised according to its tenor;

(3) however, a bankruptcy court has a discretion or even a residual one to temper the stringency of the said rule 127 which is a rule for the mere guidance of the court, and which does not impose absolute prohibition of adjournment just because of the absence of a prior notice of intention to show cause. The court still has the discretion, for any sufficient cause, or any reasonable ground to order a postponement;

(4) the medical report tendered by the debtor's counsel had no bearing on the outcome of the case, as there was no question of the debtor giving oral evidence that day (as distinct from affidavit evidence); also, the debtor was represented throughout by counsel who had made somewhat impassioned pleas on his behalf indicative of the debtor's ability to pay the sum claimed, thus managing to persuade the court to adjourn the petition several times causing the learned counsel for the creditor to believe, not without a reasonable ground for so believing, that his client had been unfairly treated, believing as the learned counsel must have, in the absoluteness of rule 127 of the Bankruptcy Rules;

(5) in the circumstances, the court did not think that the refusal of the adjournment on June 30, 1987 would result in any injustice to the debtor; on the contrary, the court considered that it might cause an injustice to the petitioning creditor if a fourth adjournment was granted. No cause in any event had been shown to the satisfaction of the court against the petition. The court was obliged to make the orders complained of.

*Cases referred to:*

(1) *Palaniappa Chettiar* v. *Arunasalam Chettiar* (Civil Appeal F.M. No. 34 of 1959).

(2) *Tan Eng Hoe* v. *Liang Hooi Kiang* [1961] M.L.J. 119.

BANKRUPTCY PROCEEDINGS.

*Minderjit Kaur (Ms)* for the judgment debtor.
*Lim Teik Chong* for the judgment creditor.

*Cur. Adv. Vult.*

**Peh Swee Chin J.**: On June 30, 1987, the bankruptcy petition against the debtor (since adjudged bankrupt) once again came up for hearing for the fourth time before the court and his counsel again asked for an adjournment which met for the first time with a refusal and the ensuing receiving and adjudication orders were made against him from which he has now appealed to the Supreme Court. I now give my reasons for such refusal.

The act of bankruptcy complained of was a failure to comply with a bankruptcy notice based on judgment sums, interest and costs obtained in Ipoh High Court Civil Suit Nos. 1196/84 and 1321A/84, totalling $940,059.17 as mentioned in the said bankruptcy notice.

The petition was served on the then debtor on July 11, 1986 and it was fixed for its first hearing on August 15, 1986 but for some reason which was not clear, it came up actually for its first hearing on October 13, 1986.

On October 13, 1986, learned counsel appeared for the debtor and asked for adjournment for two weeks, with learned counsel for the petitioning creditor appearing not to have objected to it. It was adjourned to December 8, 1986. The ground

of application for adjournment was that that the debtor had entered into some scheme of arrangement; presumably, a settlement of the creditor's claim was very much in sight.

On December 8, 1986, the petition came up in court for the second time, and learned counsel for the debtor informed the court that an attempt was to be made to recover money due to the debtor. Learned counsel for the creditor informed the court that the amount owed was very large, presumably expressing doubts on the debtor's ability to settle the sum due. The court gave a final postponement to April 3, 1987.

On April 3, 1987, the petition came up for the third time in court, and it was supposed or intended to be for the last time without envisaging any further adjournment. Adjournment was asked for by the debtor's counsel nonetheless and the petitioning creditor's counsel appeared to have offered no resistance. It was adjourned to June 30, 1987, as it was thought that a settlement was imminent.

On June 30, 1987, the petition came up for the fourth time and this time the debtor's counsel tendered a medical certificate in respect of the debtor's illness. Learned counsel told the court that the money was supposed to be paid by June 1987 and that these judgments were obtained two years ago, that not one cent had been paid, that the matter had come up on three previous occasions, and it was not fair to the petitioning creditor.

Learned counsel for the debtor, in asking for adjournment, referred to section 97 of the Bankruptcy Act, and that the debtor had some contracts in hand worth $2 million and that $20,000 was offered to the petitioning creditor in the beginning of the year.

The receiving order and adjudication order were made against the debtor as the court, in refusing any request for a further adjournment, told the parties that it would be failing in its duty if another adjournment was granted to the debtor.

Such were more or less the facts that led to the orders being made, "more or less" because on motions day in court, disposal of matters in court would usually be speeded up for the benefit of the long-waiting crowd in court after the disposal of chambers matters; consequently, notes of counsel's arguments would be kept to the minimum to save time. This I hope would explain the somewhat brevity of the notes recorded.

It would be pertinent to repeat a few basic principles applicable to this matter. Generally, in the matter of adjournment, it is a matter within the discretion of the trial judge, and an appellate court will not interfere with a refusal of adjournment unless it appears that the result of such refusal has been to defeat the rights of an applicant altogether or it is an injustice to such applicant, per the then Dato' Sir James Thomson C.J., in *Palaniappa Chettiar* v. *Arunasalam Chettiar,*[1] and quoted with approval by the Federal Court in *Tan Eng Hoe* v. *Liang Hooi Kiang.*[2] However, in bankruptcy proceedings, the matter of adjournment assumes a different hue.

Adjournment of a bankruptcy petition, as distinct from an order of stay of bankruptcy proceedings, seems to be dealt with only by rule 127 of the Bankruptcy Rules 1969 and it reads:

> "After the expiration of one month from the day appointed for the first hearing of a petition (provided such petition shall have been duly served) no further adjournment of the hearing merely by consent of the parties shall be allowed unless the debtor has given prior notice that he intends to show cause against the petition; but in every such case unless an order for adjournment is made the court shall either make a receiving order or dismiss the petition."

By rule 127, the court's discretion is to be exercised according to its tenor. It appears that the adjournment of a petition is up to the court up to the end of one month after a petition first comes up for hearing (after service before such first hearing). After the end of the said month, there would be no adjournment by consent unless the debtor has given prior notice of his intention to show cause against the petition, and in the absence of such prior notice, the court shall either make a receiving order or dismiss the petition. The dismissal of the petition should ordinarily be a result of due cause against the petition having been shown to the satisfaction of the court.

However, in my view, a bankruptcy court has a discretion, or even a residual one, to temper the stringency of the said rule 127 which is a rule for the mere guidance of this court, and which does not impose an absolute prohibition of adjournment just because of the absence of a prior notice of intention to show cause. The court has still the discretion, for any sufficient cause, or any reasonable ground to order a postponement. A suffi-

cient cause will be, *inter alia*, a genuine offer to settle the amount claimed. Section 6 of the Bankruptcy Act 1967 tends to support my view, though indirectly, by providing that for any sufficient cause (not specified therein), the court may dismiss a petition. It could not be wrong to say that for any sufficient cause the court may also adjourn a petition, though the sufficiency of such cause should be considered in the light of the examples of showing cause as set out in the said section 6. Further, under the said section, after the end of the said one month, it merely says that no adjournment shall be allowed merely on the basis of consent of both the petitioning creditor and the debtor; it does not expressly preclude the court from granting an adjournment of its own motion for any sufficient cause. Furthermore, the court may even stay any bankruptcy proceedings pending an appeal from the judgment on which a bankruptcy notice is based (*vide* section 6(4)), or for other reasons. A stay is basically or mostly an adjournment without a new date, pending the happening of a specified event *etc.* in which an adjournment, usually of a very much longer period, is involved.

Under section 6 of the Bankruptcy Act 1967, at the hearing of a petition, instances of showing cause against a petition are set out, though they are not necessarily exhaustive. Thus a debtor may dispute the proof of (a) the debt; (b) the act of bankruptcy; (c) service of the petition; (d) the inability to pay debts. In addition, the court may also stay the proceedings pending an appeal from the judgment on the basis of which the bankruptcy notice is based. There could be of course a variety of circumstances involved in a dispute about the proof of an act of bankruptcy, such as the judgment in question has been entered for a larger sum than that which is actually due, or that the execution of judgment has been stayed, or that there was a cross claim, set-off or counterclaim which should equal or exceed the judgment sum claimed and which the debtor could not set up in the action in which it was obtained.

Let us revert to the facts of the instant case. The reason for asking for adjournment had been the possibility or probability that the debtor would settle the sum due, as he had secured a contract worth $2 million, the implication being that money would be available from the payment to him from such contract work, or otherwise from the profit to him arising from such contract work.

I ought to mention a notice of motion which was taken out by the debtor (on the same day when the receiving order and adjudication order were made against him) asking for stay of proceedings. Though it was fixed for hearing on the same day it was filed, it was not brought to the attention of the court for disposal, and consequently it was not heard *inter partes* on that day. Since it may be fixed for hearing and a receiving order does not prevent the hearing of such application, any comment on it now will be premature and it will not be legitimate to dip into the matters raised in the supporting affidavit at this stage.

The medical report tendered by the debtor's counsel had no bearing on the outcome of the case, as there was no question of the debtor giving oral evidence that day (as distinct from affidavit evidence); also, the debtor was represented throughout by counsel who had made somewhat impassioned pleas on his behalf indicative of debtor's ability to pay the sum claimed, thus managing to persuade the court to adjourn the petition several times causing the learned counsel for the creditor to believe, not without a reasonable ground for so believing, that his client had been unfairly treated, believing as the learned counsel must have, in the absoluteness of rule 127 of the Bankruptcy Rules.

In the circumstances, the court did not think that the refusal of the adjournment on June 30, 1987 would result in any injustice to the debtor; on the contrary, the court considered that it might cause an injustice to the petitioning creditor if a fourth adjournment was granted, and that as no cause in any event had been shown to the satisfaction of the court against the petition, the court was obliged to make the orders complained of.

*Order accordingly.*

Solicitors: *Ranjit Singh & Co.; Lim Seong Chan & Co.*